In the High Court of Punjab and Haryana, Chandigarh.

C.R. No.4609 of 2007

Date of Decision: 11.09.2007

Pawan Kumar

…Petitioner.

Versus

Punjab State Electricity Board and Others.

…Respondents.

CORAM: HON'BLE MR.JUSTICE RAJESH BINDAL

Present: Mr.Ashok Jindal, Advocate
for the petitioner.

ORDER

RAJESH BINDAL, J.

A case in hand is classic example of luxury litigation where the petitioner had sought to approach this Court merely for a dispute of Rs.250/- towards payment of costs. Before that he had even filed an application before the learned trial Court, which was dismissed

In a suit for permanent injunction filed by the petitioner/plaintiff against the respondents/defendants, on April 8, 2006, the following order was passed:-

> "No evidence of the plaintiff is present. Adjournment prayed, which is allowed for 25.5.2006 subject to the payment of Rs.250/- as costs. This would

> be last opportunity. Entire evidence be produced on that date".

A perusal of the above order shows that the petitioner/plaintiff was permitted to lead his entire evidence on the date fixed subject to payment of Rs.250/- as costs. On the next date fixed, statements of two witnesses produced by the petitioner/plaintiff were recorded and their cross-examination was deferred on the request of opposite counsel. It was further directed that the remaining evidence of the petitioner/plaintiff be also produced on the same date. The order passed by the learned Court below on May 25, 2006 is extracted below:-

> "Statements of two witnesses have been recorded in chief and their cross examination deferred at request of counsel for the defendants. At his request present witnesses are bound down for 17.8.2006. Remaining entire evidence be also produced on that date. Long adjournment has been granted due to the intervening spell of summer vacations".

A perusal of the above order shows that nothing is noticed as regards either the payment of costs or the objection to the non-payment thereof. Thereafter, the case was adjourned for 2-3 dates. On August 23, 2007, the Court passed the following order:-

> "Today PW-1 Pawan Kumar and PW-2 Devinder Singh Gill are present to suffer cross-examination but ld. Counsel for the defendants No.1 to 3 brought to the notice of the Court that plaintiff has not paid the previous cost of Rs.250/- imposed upon him vide order dated 05.04.2006. Plaintiff was again directed to pay the previous cost vide order dated

> 8.1.2007 but till today he has not paid the cost. In the interest of justice, one opportunity is granted to the plaintiff to pay the previous cost of Rs.250/- on 24.8.2007 and thereafter he can proceed with his evidence.
>
> Sd/-
>
> ACJ/23.8.2007
>
> At this stage, Ld. Counsel for the plaintiff appeared and moved an application for directing the opposite counsel to cross-examine the witnesses present in the Court. It be put up on 24.8.2007 the date already fixed in this case.
>
> Sd/-
> ACJ/23.8.2007"

In terms of the order, the Court noticed the fact that the costs imposed by it vide order dated April 8, 2006 have not been paid by the petitioner/plaintiff. An opportunity was granted for payment thereof on August 23, 2007. On August 23, 2007, the petitioner/plaintiff moved an application for directing the respondents to cross-examine the witnesses produced by him. It was further stated therein that in fact the costs of Rs.250/- imposed vide order dated April 8, 2006, by the Court were duly paid but inadvertently it could not recorded in the interim order passed. However, it was submitted that after the imposition of costs, the respondents having not pressed for payment thereof on the next date of hearing, the right is deemed to have been waived off. On consideration of the application, learned Additional Civil Judge (Senior Division) dismissed the same with the following observations:

> "I have considered this contention of the ld. Counsel for the plaintiff and do not find myself agree with it. Perusal of the file shows that vide order dated 5.4.2006 of my ld. Predecessor, the costs of Rs.250/- were imposed upon the plaintiff for non-examination of the PWs. Thereafter, there is nothing in the interim order regarding payment of said cost. The version of plaintiff cannot be believed that the costs were paid. It is relevant to mention here that again vide order dated 8.1.2007 my ld. Predecessor directed to pay the previous costs. Had the costs been paid by the plaintiff as alleged by him the subsequent directions have not been there by my ld. Predecessor dated 8.1.2007. It is further relevant to mention here that on 23.1.2007 this Court has again directed the plaintiff to pay the previous costs of Rs.250/- and that only then he can proceed with his evidence. No appeal or revision has been filed against that order dated 23.1.2007. The application for cross-examination of the Pws without the payment of costs, thus, not maintainable at this stage. Once the direction has been issued to the plaintiff to pay the costs, the same cannot be recalled. Accordingly the application stands dismissed.
>
> Now to come up on 11.9.2007 for Pws subject to the payment of previous costs of Rs.250/-".

It is against the above order passed by the learned Court below that the petitioner/plaintiff is before this Court.

Learned counsel for the petitioner has relied upon the Full Bench judgment of this Court in **Prem Sagar v. Phul Chand 1984 Recent Revenue Reports 576** wherein while dealing with the issue regarding imposition and payment of costs, this Court held as under:

> ....”6. Adverting back to the language of Section 35-B as also to the ratio of Anand Parkash's case (supra) it would be obvious therefrom that the crucial date on which the statute focusses itself is the date next following the date of the order of payment of costs. It is from the said that the further prosecution of the suit or the defence is made conditional on the payment or tender of costs. The twin object or purpose, therefore, appears to be to avoid procrastination or delay by the parties in the already tardy pace of civil proceedings and to impose a heavy sanction for any non-compliance with the order to pay costs. As was observed in Anand Parkash's case (supra) such orders in essence in terrorem, so that the unscrupulous litigant may not indulge in dilatory tactics. It calls for pointed notice that even here the result is not automatic and as held by the Full Bench a discretion still remains with the trial Judge under Section 148 of the Civil Procedure Code to exercise his power in favour of the defaulting party. Therefore, if on the date next following the date of the order of payment of costs the issue is not raised by either of the parties or taken notice of by the Court, it cannot be said that thereafter on all or any subsequent date the same can be resuscitated or that Section 35-B

would continue to apply with all its rigour thereafter as well. Indeed it seems inevitable that if on the crucial date fixed for the payment of costs the question is not raised at all, then impliedly a waiver of the right arising in favour of the party entitled to costs would necessarily follow. Therefore, on subsequent dates it would not be open to the parties to reopen the issue at their will and seek the barring of the further prosecution of the suit or the defence under Section 35-B afresh. It is axiomatic that the law is for the vigilant and not for those who blissfully sleep over their rights.

7. Again it seems to be manifest that an order for the payment of costs is plainly one in favour of the individual litigant. Under Section 35-B such an order is in terms made for reimbursing the other party in respect of the expenses incurred by him in attending the Court on that date and is, thus, compensatory in nature. The failure to pay these costs results in the arising of a valuable right in the opposite party to bar the prosecution of the suit or the defence, as the case may be. Now on general principles, even, it is plain that a person in whose favour such a right accrues may waive the same. Obviously, it would be untenable to hold that a party must be compelled to exercise a right vested in him. Therefore, it would follow that if such a right can be waived expressly, then equally it may be so done impliedly or at least deemed to be so in the eye of law. In the context of Section 35-B if on the date next

> following the date of the order of the payment of costs, the issue is not raised by either of the parties or taken notice of by the Court, and the case is allowed to proceed further, it would follow that the party having the right to bar the further prosecution of the suit or the defence has waived its right. Thereafter, it would not be possible to again exercise the ghost of the stringent provisions of section 35-B at any and every subsequent date".

It is unfortunate that the Full Bench judgment of this Court was neither referred to by the learned counsel for both the parties nor was in the notice of the learned trial Court. Though prima facie the claim made by the petitioner seems to be sustainable, however, keeping in view the smallness of amount involved in the present petition, I do not deem it proper to entertain the same.

Accordingly, the petition is dismissed in limine.

(Rajesh Bindal)
Judge

September 11, 2007
"DK"